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No. 729

In the Supreme Court of the United States

OCTOBER TERM, 1943

JOSEPH B. DECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 122–125) has not yet been reported. The opinion of the district court overruling the petitioner's demurrer to the indictment (R. 12–20) is not reported, and the opinion of that court overruling motions in arrest of judgment and for a new trial (R. 55–64) is reported at 51 F. Supp. 15.

JURISDICTION

The judgment of the circuit court of appeals was entered January 21, 1944 (R. 125). The petition for a writ of certiorari was filed Feb-

ruary 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the particular use of the mails charged in the indictment and proved at the trial was "for the purpose of executing" the scheme to defraud within the meaning of Section 215 of the Criminal Code (18 U. S. C. 338).

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * writing, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any such letter, * * * writ-

ing, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment, returned February 16, 1943, by a grand jury of the District of Maryland, charged petitioner and Gustav H. Kann, in five counts, with violating the mail fraud statute, 18 U. S. C. 338 (R. 1–11). Each count (Counts 2 to 5 by reference to Count 1) alleged that Kann and petitioner, as president and as vice-president and general manager, respectively, of Triumph Explosives, Inc. (hereinafter referred to as "Triumph"), devised a scheme to defraud Triumph, its stockholders, and Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania. The scheme alleged was one by means of which the defendants would misappropriate the funds of Triumph by causing Elizabeth Jackson, petitioner's secretary, to withdraw and turn over to them funds of Triumph obtained through the issuance of Triumph's checks payable to Miss Jackson and drawn on Peoples-Pittsburgh Trust Company and on the Peoples Bank of Elkton, Elkton, Maryland (R. 1–3). It was further alleged to be part of the scheme that the misappropriations thus effected were to be concealed by making it appear on the books of Triumph that Elizabeth Jackson received the money for commissions, and by falsely representing and pretending to the officers, directors, and employees of Tri-

umph that the checks were drawn for commissions due and payable by it (R. 3–4).[1] Each count charged that in execution of this scheme the defendants at Elkton, Maryland, caused to be placed in the mails a different check payable to Elizabeth Jackson and drawn on the Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania (R. 4–11).

Defendants' demurrer to the indictment was overruled (R. 12–20), and they were tried and found guilty on all counts (R. 55). Motions in arrest of judgment and for a new trial were overruled (R. 55–64), and petitioner was sentenced to imprisonment for three years and to pay a fine of $1,000 (R. 64).

On appeal to the Circuit Court of Appeals for the Fourth Circuit the conviction was affirmed (R. 122–125).

The pertinent facts, substantially all of which are undisputed, may be summarized as follows:

Nine checks totaling $84,106, dated between February 8, 1941, and April 23, 1942, drawn by Triumph, were offered in evidence by the Government (R. 77). All but one of these checks were co-signed by petitioner with defendant Kann or with Criswell, the second vice president of

[1] The defrauding of the Peoples-Pittsburgh Trust Company by increasing the compensation of the defendants, contrary to a loan agreement, was also alleged to be part of the scheme. This aspect of the case was not emphasized by the Government and is not in issue here.

Triumph (R. 76–77). Four of these checks were drawn on the Peoples Bank of Elkton, Maryland (R. 78–79).[2] The five checks forming the basis of the five counts in the indictment were all drawn on the Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania, payable to Elizabeth Jackson (R. 4, 6, 7, 9, 10, 76, 77, 78) and were as follows (R. 78–79):

April 18, 1941	$13,703.50
July 21, 1941	1,300.00
August 14, 1941	5,200.00
January 14, 1942	10,312.50
April 23, 1942	20,625.00

Miss Elizabeth Jackson, petitioner's personal secretary (R. 75), identified each of the checks and testified that, at the instruction of the defendants, she had successively made out each of the nine checks payable to herself, and had taken each to the Peoples Bank of Elkton, where she obtained cash, or drafts, or both, immediately turning the proceeds over to either Kann or petitioner (R. 79–88). She then made out an invoice, or voucher, at the direction of the defendants, clearing the transaction through her account with Triumph (R. 79, 83–85, 91). Each voucher bore the statement "To commission" and when entered on Triumph's books reflected that the amount had been paid to Miss Jackson and

[2] The amounts and dates of these checks were as follows:

February 8, 1941	$14,942.50
April 7, 1941	5,760.00
September 25, 1941	1,950.00
January 10, 1942	10,312.50

charged to commissions on foreign contracts (R. 83–84). The amounts of the checks were determined by computing 5% of final payments on contracts between Triumph and certain foreign governments, or 2½% on advance payments thereon (R. 88).

The five checks drawn on the Peoples-Pittsburgh Trust Company, when cashed by the Peoples Bank of Elkton, were duly transmitted by it through the mails to the Peoples-Pittsburgh Trust Company, where they were honored (R. 65–72).

ARGUMENT

Petitioner concedes (Pet. 11) the sufficiency of the evidence to support findings (1) that there was a *continuing* scheme to defraud, (2) that the mails were used by the Elkton Bank in forwarding the checks to Pittsburgh, and (3) that petitioner caused the checks to be placed in the mails. He contends, however, that the evidence is insufficient as a matter of law to establish that the mails were used "for the purpose of executing such scheme", because the Elkton Bank, upon cashing each check, became a holder in due course, and at the same instant the scheme to defraud as to that check was at an end since the victim corporation could not stop payment and avoid loss (Pet. 11–12).

There is no merit in petitioner's contention, for it completely disregards the facts with reference to the nature of the scheme itself, and

uses as a criterion the technical question of liability under the law of negotiable instruments. As Judge Chesnut stated in his memorandum opinion overruling the motions in arrest of judgment and for a new trial (R. 64):

> * * * the technical question of negotiable instruments law is not the conclusive factor in determining whether the defendants caused the mailing of the checks in furtherance of the scheme. That the Elkton bank became the holder of the checks in due course is merely one fact to be considered in determining whether the defendants caused the mailing of the checks in furtherance of the scheme. This ultimate question depends largely upon the nature of the scheme itself which in this case we have seen was a continuing one which contemplated ultimate withdrawal of the funds from the Pittsburgh bank.

If the defendants had been "hit and run" defrauders, it might be argued with greater plausibility that the scheme to defraud was at an end when the money was obtained from the Elkton Bank, for in such a case the purpose of the scheme would have been to abscond with the money after the first check had been cashed, and it would have been immaterial whether the checks cleared or not. *Stapp* v. *United States,* 120 F. (2d) 898, 899 (C. C. A. 5). However, that was not the scheme of the defendants. They were officers of the corporation and there is nothing

to indicate that they contemplated flight. Rather, as the indictment alleged and the proof showed, it was a part of their scheme to cover up their misappropriations. Naturally, they did not intend to be discovered and it was a most vital and important part of the scheme that the checks clear and be charged to Triumph's account with the Pittsburgh bank. Indeed, they contemplated that very eventuality by making it appear on Triumph's books that Elizabeth Jackson, the personal secretary of petitioner, received the money for commissions.[3] It is well settled that the use of the mails, even after the money is received, for the purpose of assisting in retaining the money or of indefinitely delaying or preventing the discovery of the fraud is within the purview of the mail fraud statute. *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Davis* v. *United States,* 125 F. (2d) 144 (C. C. A. 6); *Bogy* v. *United States,* 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Creech* v. *Hudspeth,* 112 F. (2d) 603, 606 (C. C. A. 10); *Lewis* v. *United States,* 38 F. (2d) 406, 415 (C. C. A. 9); *Brady* v. *United States,* 26 F. (2d) 400, 401 (C. C. A.

[3] As the court below pointed out (R. 124), "There is every reason to infer that the scheme would have continued more or less indefinitely until the detection of the fraud, which seems to have been effected largely through the investigations of Lieutenant Commander Seidman of the Price Adjustment Board of the Navy Department." (See R. 110–119.)

9), certiorari denied, 278 U. S. 621; *Newingham* v. *United States,* 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Freeman* v. *United States,* 244 Fed. 1, 9–10 (C. C. A. 7), certiorari denied, 245 U. S. 654; *Farmer* v. *United States,* 223 Fed. 903, 910 (C. C. A. 2), certiorari denied, 238 U. S. 638. Hence, even if the scheme had encompassed only one transaction, the mailing would have been within the interdiction of the act.

Moreover, as petitioner concedes (Pet. 11), the fraudulent scheme was a continuing one. It is evident that such a continuing scheme would not have been possible without the proper clearance of each successive check, especially in view of the fiduciary relationship existing between the defendants and the victim. Such clearance was accomplished by the use of the mails.[4]

Petitioner relies heavily on *Stapp* v. *United States,* 120 F. (2d) 898 (C. C. A. 5), *Dyhre* v. *Hudspeth,* 106 F. (2d) 286, 288 (C. C. A. 10), and *United States* v. *McKay,* 45 F. Supp. 1001 (E. D. Mich.), and asserts that the decision below is in direct conflict with the decision of the Cir-

[4] That the jury so found is apparent from the trial judge's instruction (R. 40):

"Furthermore, you must find beyond a reasonable doubt that the sending through the mails of one or more of the five checks was in execution or attempted execution of the fraud on the corporation; and you must find that the checks, if they were mailed, were mailed while this scheme to defraud was still continuing."

cuit Court of Appeals for the Fifth Circuit in the *Stapp* case (Pet. 12–14, 18). But those cases are clearly distinguishable on their facts.[5] The courts there recognized and applied the rule that use of the mails after the fraudulent scheme had already been completed is not within the purview of the statute. That is not the situation here. The scheme of the defendants in the instant case had not ended upon the cashing of the

[5] In the *Stapp* case the victim purchased with his personal check a cashier's check payable to Rudder, one of the defendants, and turned it over to Rudder, who cashed it the next day. The victim's check was subsequently sent through the mails to the drawee bank for collection. The court held that the purpose of the scheme to defraud had been completely carried out when the money was paid to Rudder. The defendants at that time had already accomplished all that they had set out to do, the use of the mails was only incidental, and the defendants had no interest in that phase of the transaction.

In the *Dyhre* case the indictment first alleged a general scheme to defraud named business houses in Lake Providence, Louisiana, by passing worthless checks in exchange for merchandise, and then, in each of eight counts, charged the passing of a particular check which the defendant caused to be sent through the mails for clearance "for the sole and only purpose of defrauding said corporation of the amount of said check" (106 F. (2d), at 286–287). After holding that the mailings were not in execution of the schemes alleged, the court stated that "it can not be reasonably contended that there was one fraudulent scheme" as each person who was induced to cash defendant's checks "was separately defrauded by representations made to him alone, the pleader so charged them, and the Grand Jury found that each count was a separate offense. The defrauding of one had no connection with the defrauding of another" (p. 288). In the present case, the indictment charges only one general con-

checks by the Elkton Bank. To the contrary, as we have shown (*supra,* pp. 7–9), the clearance of the checks was not only in furtherance of, it was essential to, the effectuation of the scheme to defraud. Until those checks had been mailed to and paid by the Peoples-Pittsburgh Trust Company, the account of Triumph had been charged with the items, and all necessary vouchers, book entries and other acts and methods of concealment had been accomplished, the scheme to defraud was not consummated. *Steiner* v. *United States,* 134 F. (2d) 931 (C. C. A. 5); *Davis* v. *United States, supra; Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684; *Bogy* v. *United States, supra; Lewis* v. *United States, supra; Tincher* v. *United States,* 11 F. (2d) 18 (C. C. A. 4), certiorari denied, 271 U. S.

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tinuing scheme to defraud and the mailing of five checks each in furtherance of the same scheme.

In the *McKay* case the schemers caused Edsel Ford, upon misrepresentation of facts, to purchase two cashier's checks at the Manufacturer's National Bank, Detroit, payable to Bass-Luckoff, Inc. These checks were deposited by the payee. The proceeds of one of the checks was used to purchase a cashier's check payable to McKay. Bass-Luckoff, Inc., gave McKay its own check for part of the proceeds of the other check purchased by Ford. McKay cashed the checks at a bank in Grand Rapids, and the mailing of the checks by that bank to the Detroit bank was the basis of the indictment. The court held that the scheme alleged was one to defraud Ford; that it was fully consummated when he caused cashier's checks to be delivered to Bass-Luckoff, Inc.; and that the subsequent use of the mails was not in execution of the scheme to defraud Ford, the checks not being those of the victim, who had long since parted with his money.

664; *Newingham* v. *United States, supra; United States* v. *Leche,* 34 F. Supp. 982 (W. D. La.), affirmed 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Preeman* v. *United States, supra; Farmer* v. *United States, supra.*

CONCLUSION

This case was correctly decided below, there is no real conflict of decisions, and the petition for a writ of certiorari presents no question of general importance. We, therefore, respectfully submit that it should be denied.

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